GARNISHMENT IN OHIO: WHERE IS IT NOW?

On June 5, 1970, the 108th General Assembly of the State of Ohio passed Amended Substitute Senate Bill No. 85.[1] This Act revises the garnishment procedure, increases the exemptions for personal earnings and certain items of personal property, prescribes that garnishment is to be granted only after judgment, modifies the venue in actions on cognovit notes and specifies a warning which must be included in all cognovit notes. The main thrust of this Act, however, is aimed at the garnishment of personal earnings. Accordingly, this note examines the specific topic of post-judgment garnishment[2] of personal earnings in Ohio. The necessity of this examination arises from the incompatibility of this Act with the federal Consumer Credit Protection Act.[3] The resolution of a substantial number of the points of this discord occurred in *Hodgson v. Cleveland Municipal Court*.[4]

I. INTRODUCTION

Simply stated, garnishment is strictly a statutory proceeding, ancillary to a main action, by which a creditor seeks satisfaction of an indebtedness out of an obligation owing to a debtor from a third person.[5] The person instituting the proceeding is referred to as the creditor or plaintiff; the person indebted to the creditor is called the debtor or defendant; and the person holding the debtor's property is termed the garnishee.

Confusion often results in Ohio law because the area delineated by the words "attachment," "execution" and "garnishment" is permeated with misunderstanding and improper use of terms and definitions in both the Ohio statutes and case law. Further, the Ohio statutes dealing with attachment and aid in execution are not admirably arranged, and they use the term garnishment loosely, disregarding its proper legal meaning.[6] "The term attach implies seizure. . . . 'The only object of

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[1] Amended Substitute Senate Bill No. 85 [hereinafter referred to as the Act] became effective September 16, 1970.

[2] For discussion of garnishment and its negative social and economic effects *see generally* Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214 (1965); Patterson, *Forward: Wage Garnishment—An Extraordinary Remedy Run Amuck*, 43 WASH. L. REV. 735 (1968); Satter, *Argument for the Abolition of Wage Attachment*, 52 ILL. B. J. 1026 (1964); Comment, *Garnishment of Wages in Pennsylvania: Its History and Rationale*, 70 DICK. L. REV. 199 (1966); Comment, *Wage Garnishment—The Contemporary Shylock's Pound of Flesh*, 40 MISS. L. J. 151 (1968); Comment, *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 743 (1968); Comment, *Wage Garnishment as a Collection Device*, 1967 WIS. L. REV. 759 (1967).

[3] 15 U.S.C. §§ 1601-1681t (1970).

[4] 326 F. Supp. 419 (N.D. Ohio 1971) [hereinafter referred to as *Hodgson-Cleveland*].

[5] Union Properties, Inc. v. Patterson, 143 Ohio St. 192, 54 N.E. 2d 668 (1944).

[6] *See* 5 OHIO JUR. 2d *Attachments* §§ 2, 3, 4 (1954).

attachment is to take out of the defendant's possession, and to transfer into the custody of the law, acting through its legal officer . . . .' "[7] "The word garnishment . . . mean[s] to take warning or to beware. The meaning of the word as seen in the law term garnishee is, that a person who owes or holds money belonging to another is warned by order of court not to pay it to his immediate creditor, but to a third person who has obtained or may obtain final judgment against that creditor."[8] The distinction between the two terms is that in an attachment proceeding the property of the debtor is taken into legal custody pending judgment in the action, while in a garnishment proceeding the property is left in the possession of the garnishee.[9] The garnishment process is used most frequently today to satisfy an indebtedness out of an employee-debtor's unpaid earnings held by the employer.[10] The Act's main thrust is directed at this use of the garnishment process.

The impetus behind the Act was the passage by Congress of the Consumer Credit Protection Act (CCPA).[11] Title III[12] of the CCPA imposes certain restrictions on the garnishment process. These federal restrictions[13] apply to state garnishment laws which do not establish restrictions on garnishment substantially similar to or more restrictive than those provided by Title III of the CCPA. Since the former Ohio garnishment statutes did not meet the standards of the CCPA the Ohio legislature was faced with either accepting the federal restriction as the applicable law or revising the Ohio law. Prior to the passage of the Act,

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[7] Buckeye Pipe Line Co. v. Fee, 62 Ohio St. 543, 557, 57 N.E. 446 (1900) (citation omitted).

[8] Kirby v. Kerr Turbine Co., 18 Ohio N.P. (n.s.) 425, 427 (1916).

[9] While Amended Substitute Senate Bill No. 85 is a revision, and revision implies correction and improvement, the bill was written to fit into the existing Ohio Revised Code structure with the result that misunderstanding and improper use of terms and definitions still exist. An example of this may be found in OHIO REV. CODE ANN. § 1911.332 (Page Supp. 1970) of the Act describing what forms are issued by the court to the employer. In the first part of § 1911.332, the legislature speaks of issuing to an employer (a) three copies of "the order of attachment," (b) a one dollar garnishee's fee, and (c) "a written notice that the garnishee answer." The third paragraph of § 1911.332 states that "The order of attachment and notice to appear shall be in substantially the following form and three copies shall be served upon the garnishee[.]" The suggested from is then entitled "Order and Notice of Garnishment and Answer of Employer." Within this one section there is no consistency in the use of language. The text of § 1911.332 speaks of an "order of attachment," while the form is entitled an "Order and Notice of Garnishment and Answer of Employer." The first paragraph indicates three items are to be issued to an employer, but the third paragraph indicates that items (a) and (c) listed above should be combined into one item and together called a different name than they were called in the first paragraph—and then the title of the example form suggests yet a third name!

[10] This Act specifically limits garnishment to a post-judgment process so garnishment is properly termed a proceeding in aid of execution.

[11] 15 U.S.C. §§ 1601-1681t (1970) [hereinafter referred to as the CCPA].

[12] 15 U.S.C. §§ 1671-1677 (1970), enacted May 29, 1968 but which did not become effective until July 1, 1970.

[13] 15 U.S.C. §§ 1673, 1674 (1970).

Ohio law permitted prejudgment garnishment.[14] Consequently an additional factor dictating change in Ohio law came from the holding of the United States Supreme Court in *Sniadach v. Family Finance Corp.* that ". . . absent notice and a prior hearing . . . prejudgment garnishment . . . violates the fundamental principles of due process."[15]

The General Assembly's response to the CCPA and *Sniadach* was the passage of Amended Substitute Senate Bill No. 85. This Act attempted to place the restrictions on garnishment necessary to bring the Ohio law in line with the CCPA, and to specifically limit garnishment to post-judgment situations in compliance with *Sniadach*. Subsequent events have frustrated this legislative attempt.[16]

Broadly stated, the basic cause for the frustration of Ohio's attempt to escape the imposition of the restrictive garnishment provisions of the CCPA lies in the fact that Congress chose an employee's *weekly earnings* as the unit for computing the amount to be garnished from his paycheck, while the Ohio legislature chose the employee's *monthly earnings* as the unit. To comprehend why this difference proved fatal to the Ohio Act, it is helpful to study the procedural operation of the Act, compare that operation to the CCPA and to examine Judge William

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[14] 62 Ohio Laws 10 (1865).

[15] 395 U.S. 337, 342 (1969). Because Ohio remains a cognovit note state, OHIO REV. CODE ANN. § 2323.13 (Page Supp. 1970), how much actual change *Sniadach* caused in Ohio law is questionable in those instances where a judgment is rendered on a cognovit note. A defendant who has signed a cognovit note may have a judgment rendered against him without notice and prior hearing. In states sanctioning cognovit judgments a constitutional problem remains: Does limiting garnishment to only post-judgment situations have any real effect where a garnishment is commenced pursuant to a judgment on a cognovit note? Is a due process issue raised by the foregoing question? This question may soon be answered by the United States Supreme Court in Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970), *probable jurisdiction noted*, 401 U.S. 991 (1971).

[16] Ohio's attempt to supersede the provisions of the CCPA began through the administrative process provided for in the federal act, 15 U.S.C. § 1675 (1970):

> The Secretary of Labor may by regulation exempt from the provisions of section 1673(a) of this title garnishments issued under the laws of any State if he determines that the laws of that State provide restrictions on garnishment which are substantially similar to those provided in section 1673(a) of this title.

Pursuant to this authority the Secretary issued 29 C.F.R. § 870.52 (1971). In accordance with this regulation, Ohio applied on July 15, 1970, for exemption of the Ohio garnishment laws from the mandates of the CCPA. While the Ohio application was pending, the Cleveland Municipal Court began implementing certain provisions of the new Ohio garnishment laws by using forms substantially identical to those prescribed in OHIO REV. CODE ANN. § 1911.332 (Page Supp. 1970). This action prompted the Secretary of Labor to seek a temporary injunction in federal district court against such implementation. The district court invited the Ohio Attorney General to participate and on September 25, 1970, the district court issued an interlocutory order and supporting memorandum granting the temporary injunction. James D. Hodgson, Secretary of Labor v. Cleveland Municipal Court, Civil Action No. C. 70-908 (N.D. Ohio September 25, 1970). On November 24, 1970 the Secretary of Labor denied Ohio's application for exemption. The last step in the frustration of the Ohio General Assembly's effort to bring Ohio law in line with the CCPA was Hogdson v. Cleveland Municipal Court, 326 F. Supp. 419 (N.D. Ohio 1971).

K. Thomas' construction of the Ohio Act and the CCPA in *Hogdson v. Cleveland Municipal Court.*[17]

II. The Legislative Design of the Ohio Act

Complying with *Sniadach*, Ohio's new garnishment Act permits only post-judgment garnishment.[18] Further, the Act provides that a creditor cannot commence an action in garnishment until he has formally confronted his debtor with the fact that a court has declared him in debt to the creditor for a specific amount. The Act dictates that this confrontation shall be in the form of a "Notice of Court Action to Collect Debt."[19] This notice informs the debtor that he can avoid an action in garnishment by exercising within at least 15 days any one of three methods: (a) paying the debt he owes, (b) applying to his local municipal or county court for a trustee relationship which will establish an arrangement for the payment of his debt out of his earnings,[20] or (c) by completing a form, which is attached to the notice, entitled "Payment To Avoid Garnishment" and submitting to the creditor an amount determined by a formula contained therein.[21] After making this formal

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[17] 326 F. Supp. 419 (N.D. Ohio 1971).

[18] Ohio Rev. Code Ann. §§ 1911.33, 2715.01, 2715.02, 2715.11 (Page Supp. 1970). Section 2715.01 states in part: "An attachment against the personal earnings of a defendant, through an action in garnishment, *may be* granted after a judgment has been obtained by the plaintiff" (emphasis supplied). Sections 1911.33 and 2715.11 are similar in intent with the exception that the former refers to municipal court procedure while the latter refers to the court of common pleas procedure. Subsection (A)(4) of each section states that one of the prerequisites of commencing a garnishment action is "[t]hat the demand in writing has been made as required by section 2715.02. . . ." Reference to the demand in writing of section 2715.02 demonstrates the demand cannot be made until a judgment has been secured. Additionally, the last sentence of section 2715.02 makes it explicitly clear: "The demand shall be made after judgment is obtained. . . ." Therefore, a reading of §§ 1911.33 and 2715.11 together with § 2715.02 indicates that the words "may be" carries the same effect as "shall be."

[19] Ohio Rev. Code Ann. § 2715.02 (Page Supp. 1970). The written demand of this section may be made in a proceeding before a court of common pleas Ohio Rev. Code Ann. § 2715.11 (Page Supp. 1970), or a county court Ohio Rev. Code Ann. § 1911.33 (Page Supp. 1970).

[20] Ohio Rev. Code Ann. § 2329.70 (Page Supp. 1970).

[21] Ohio Rev. Code Ann. § 2715.02 (Page Supp. 1970). This form is set out here.

PAYMENT TO AVOID GARNISHMENT

To: _____
(Name of Creditor)
_____
_____
(Address of Creditor)

To avoid the garnishment of which you have given me notice I enclose $_____ to apply towards my indebtedness to you. The amount of the payment was computed as follows:

1. Total amount of indebtedness demanded: (1) $_____
2. Enter the amount of your earnings after deductions required by law, for the previous monthly pay period (if not employed a full month, enter a full month's pay at your present pay rate): (2) $_____
3. Enter the lesser of — (a) an amount equal to

demand, a proceeding in garnishment may be commenced in a county court[22] or a court of common pleas.[23] In either court the steps which must be followed are identical.

These steps begin with the filing of an affidavit by the creditor conforming with § 1911.33 or the identical § 2715.11.[24] Then the creditor must provide proof to the court that the "Notice of Court Action to Collect Debt" was sent to the debtor,[25] and deposit with the court one dollar as the garnishee's fee.[26] When the court is satisfied that the creditor has properly performed his task, it issues to the employer ". . . three copies of the order of attachment, together with the garnishee's fee . . . and a written notice that the garnishee answer. . . ."[27] The Act pre-

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17.5% of the amount on line 2; or (b) the amount by which the amount on line 2 exceeds $_____ (175 times the current federal minimum hourly wage): (3) $_____

4. Enter the lesser of the amounts on lines 1 and 3. Send this amount to the creditor along with this form after you have signed it: (4) $_____

I certify that the statements contained above are true to the best of my knowledge and belief.

_____
(Signature of Debtor)

_____
(Print name and address of debtor)

I certify that the amount shown on line 2 is a true statement of the debtor's earnings.

_____
(Print Name of Employer)

_____
(Signature of Employer or Agent)

[22] OHIO REV. CODE ANN. § 1911.33 (Page Supp. 1970). While this section does not specifically state that municipal courts have jurisdiction over garnishment proceedings, OHIO REV. CODE ANN. § 1901.18 (Page 1968) provides municipal courts with jurisdiction.

[23] OHIO REV. CODE ANN. § 2715.11 (Page Supp. 1970).

[24] OHIO REV. CODE ANN. §§ 1911.33, 2715.11 (Page Supp. 1970). With the exception of the name of the court, these sections are substantively identical.

(A) An action in garnishment may be commenced in a county court [court of common pleas] by the filing of an oath in writing made by the plaintiff, his agent, or attorney setting forth:

(1) The name of the defendant;

(2) That affiant has good reason to believe that the person, partnership, or corporation named in the affidavit as the garnishee has property of the defendant not exempt under section 2329.62 or 2329.66 of the Revised Code;

(3) A description of that property;

(4) That the demand in writing has been made as required by section 2715.02 of the Revised Code;

(5) That the payment demanded in the notice required by section 2715.02 of the Revised Code has not been made, nor has a sufficient portion been made to prevent the garnishment of personal earnings in the manner described in section 2715.02 of the Revised Code;

(6) That affiant has no knowledge of any application by defendant for the appointment of a trustee so as to preclude the garnishment of defendant's personal earnings.

[25] OHIO REV. CODE ANN. §§ 1911.331, 2715.111 (Page Supp. 1970).

[26] OHIO REV. CODE ANN. §§ 1911.331, 2715.111 (Page Supp. 1970).

[27] OHIO REV. CODE ANN. § 1911.332 (Page Supp. 1970). *See also* OHIO REV. CODE ANN. § 2715.112 (Page Supp. 1970).

scribes what form "the order of attachment and notice to appear" should take, and offers an example entitled "Order and Notice of Garnishment and Answer of Employer."[28]

The receipt of this form by the employer marks the beginning of an important step in the Ohio Act, a step which will determine how much of a debtor's earnings an employer is required to pay into court. This form provides a statutory formula[29] for implementing the personal earning's exemption standards provided in §§ 2329.62[30] and 2329.66.[31] The standards of these two sections are identical.[32] The final limiting provision

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[28] OHIO REV. CODE ANN. § 1911.332 (Page Supp. 1970).

[29] *Id.* This form is set out below.

Section B. Answer of Employer (Garnishee)

(Answer all Pertinent Questions)

Now Comes _____ the employer
Herein who says:

		Yes	No
1. Defendant is in my/our employ.		—	—
It answer is "No," give date of last employment.	(1)	—	—
		Yes	No
2. Has defendant been garnished within the 30 days preceding the date of service of this form?		—	—
If answer is "Yes," give prior court and case number; then omit questions 3, 4, 5, and 6; sign the form and return it to the court.	(2)	—	—
		Court Case No.	
3. Amount I/we owe defendant for services rendered before this form was received.	(3)	$_____	
4. Enter earnings of the defendant after deductions required by law, for the previous monthly pay period (if the defendant has not been employed a full month, enter the amount of monthly pay at present pay rate):	(4)	$_____	
5. Enter the lesser of (a) an amount equal to 17.5% of the amount of line 4; or (b) the amount by which the amount on line 4 exceeds $_____ (175 times the current federal minimum hourly wage):	(5)	$_____	
6. Enter the smallest of the amount entered on line 3; or the amount entered on line 5; or the amount on line C of section A of this form. Pay this amount into court when returning this form:	(6)	$_____	

I certify that the statements above are true.

_____
(Print name of employer)

_____
(Print name and title of person who completed form)

Signed _____
(Signature of person completing form)

Dated this _____ day of _____, 19___

_____

[30] OHIO REV. CODE ANN. § 2329.62 (Page Supp. 1970).

[31] OHIO REV. CODE ANN. § 2329.66 (Page Supp. 1970).

[32] The language in both of these sections reads:

(1) One hundred seventy-five times the minimum hourly wage in effect at the time the earnings are payable, as prescribed by the "Fair Labor Standards Act of 1938," 52 Stat. 1060, 29 U.S.C. 206(a)(1), and any amendments or additions thereto or reenactments thereof;

(2) Eighty-two and one-half per cent of the debtor's disposable earnings payable

of the Ohio Act permits only one garnishment in any 30-day period.[33]

After setting forth both the substantive and procedural aspects of Ohio's garnishment laws in an attempt to escape the restrictive provisions of the CCPA, the Ohio legislature sought to insure the validity of Ohio law under federal standards by the insertion of a construction clause in the Act.

> Title III of the "Consumer Credit Protection Act," 82 Stat. 146 (1968), 15 U.S.C. 1671, provides for restrictions on garnishment of personal earnings to become effective July 1, 1970, to supersede the laws of any state which do not provide debtors with protection at least equal to the minimum protection provided in that federal act. It is the intention of the general assembly to avoid the inevitable confusion which will result if any part of the federal act is superimposed on Ohio law, by enacting garnishment laws which provide protection to debtors which equals or exceeds that contained in the federal law, and all the laws of this state affecting such garnishments shall be construed so as to effect this purpose.[34]

III. Differing Aspects of the Federal and State Laws

A literal application of the Ohio exemption formula in Section B of the form entitled "Order and Notice of Garnishment and Answers of Employer"[35] provides that only the lesser of either (1) 17½ percent of the earnings for the previous monthly pay period[36] or (2) the amount by which earnings exceed 175 times the current federal minimum hourly wage[37] be withheld by the garnishee. The federal counterpart

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from a garnishee, or, when the exemption is claimed by the debtor pursuant to a proceeding in bankruptcy, eighty-two and one-half per cent of the debtor's cross earnings for the thirty-day period ending on the tenth day prior to filing the petition in bankruptcy.

[33] OHIO REV. CODE ANN. §§ 1911.33(B), 2715.11(B) (Page Supp. 1970).

[34] OHIO REV. CODE ANN. § 2329.621 (Page Supp. 1970).

At this point it should be noted what salutary features the Ohio Act contains. The Act provides the debtor with 15 days advance notice of the pending garnishment action and provides three means for the employee to avoid garnishment, OHIO REV. CODE ANN. §§ 1911.33, 2715.11 (Page Supp. 1971). It also limits garnishment actions to a maximum of 12 in any one year period, OHIO REV. CODE ANN. § 1911.38(B) (Page Supp. 1971), compared to a possible 52 under the CCPA. Arguably, at least, the constant and continual garnishment of a debtor's weekly pay checks lends itself to unwarranted extensions of credit and the danger of subsequent job loss by the exasperated employer. This harassment value alone, in the hands of an unscrupulous creditor can be a dangerous bludgeon over the employee.

[35] OHIO REV. CODE ANN. § 1911.332 (Page Supp. 1970). *See* OHIO REV. CODE ANN. §§ 1911.331, 2715.111 (Page Supp. 1970).

[36] Because of the parenthetical language found in line (4) of Section B of the form titled "Order and Notice of Garnishment and Answer of Employer," *see* OHIO REV. CODE ANN. §§ 1911.331, 2715.111 (Page Supp. 1970), there was a problem in determining whether actual monthly earnings or the monthly pay rate, whether earned or not, was to be used. The parenthetical language in line 4 seems to suggest that an employee who works only one week of a month and received only $100.00, may be garnished on the fictitious basis that he worked the full month. However, the court ". . . determined and declared that line 4 . . . requires the employer to enter in his answer the *disposable earnings* of the employee for the 30-day period prior to issuance of the order and notice of garnishment." 326 F. Supp. at 434 (emphasis supplied).

[37] 29 U.S.C. § 206 (1970).

to the Ohio formula is § 1673 of the CCPA,[38] which provides that the lesser of either (1) 25 percent of an employee's disposable earnings for that week or (2) the amount by which his disposable earnings for that week exceed 30 times the federal minimum hourly wage may be withheld. This section also provides that for any pay period other than a week the Secretary of Labor shall prescribe the applicable formulas.[39]

Another difference between the two laws is the protection they afford a debtor's employment because of the garnishment process. The CCPA provides that an employee may not be discharged because his earnings have been subjected to garnishment to satisfy *one creditor*,[40] while the Ohio Act provides that an employee may not be discharged because his earnings have been subject to *one action* in garnishment in any 12-month period.[41] These two statutes also differ in that the Ohio Act does not provide a criminal sanction for the improper dismissal

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[38] 15 U.S.C. § 1673 (1970).

(a) Except as provided in subsection (b) of this section and in section 1675 of this title, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed

(1) 25 per centum of his disposable earnings for that week, or

(2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 206(a) (1) of Title 29 in effect at the time the earnings are payable, whichever is less. In the case of earnings for any pay period other than a week, the Secretary of Labor shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2).

(b) The restrictions of subsection (a) of this section do not apply in the case of

(1) any order of any court for the support of any person.

(2) any order of any court of bankruptcy under chapter XIII of the Bankruptcy Act.

(3) any debt due for any State or Federal tax.

(c) No court of the United States or any State may make, execute, or enforce any order or process in violation of this section.

[39] 29 C.F.R. § 870.10 (1971). The applicable portions of the Secretary's regulation in the case of earnings for any period other than a week reads in part:

(1) The 25 percent part of the formula would apply to the aggregate disposable earnings for all the workweeks compensated.

(2) The "multiple" of the Federal minimum hourly wage equivalent to that applicable to the disposable earnings for 1 week is represented by the following formula: The number of workweeks, or fractions thereof (X) x 30 x the applicable Federal minimum wage ($1.60). For the purpose of this formula, a calendar month is considered to consist of 4 1/3 workweeks. Thus, so long as the Federal minimum hourly wage is $1.60 an hour, the "multiple" applicable to the disposable earnings for a 2-week period is $96 (2 x 30 x $1.60); for a monthly period, $208 (4 1/3 x 30 x $1.60); and for a semi-monthly period, $104 (2 1/6 x 30 x $1.60). The "multiple" for any other pay period longer than 1 week shall be computed in a manner consistent with section [1673(a)] of the [CCPA] and with this paragraph.

[40] 15 U.S.C. § 1674(a) (1970).

(a) No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness.

[41] OHIO REV. CODE ANN. § 2715.01(L) (Page Supp. 1970). The last paragraph of 2715.01(L) reads:

No person shall discharge an employee solely by reason of such employee's personal earnings from such person having been attached through no more than one action in garnishment in any twelve-month period.

of an employee due to garnishment while the CCPA does so provide.[42]

The Ohio law provides no definition for the terms "earnings" or "personal earnings," other than that which can be gleaned from the rest of the Act, while the CCPA provides such definitions.[43] Because the federal act includes public and private pension and retirement payments in its definition of "personal earnings," and Ohio's law is silent on that point, it may be inferred that the Ohio Act does not provide any garnishment protection for these items. Another difference between the two acts is that the Ohio law applies to Ohio residents only,[44] while the federal law applies to "all persons."

The differences which have been noted provide the substance of the conflict between the CCPA and the Ohio Act. The forum which resolved much of this conflict was the United States District Court in *Hodgson v. Cleveland Municipal Court.*[45]

IV. THE HODGSON-CLEVELAND DECISION

In any conflict between a federal and a state law one of the initial questions often requiring decision is the constitutionality of the federal legislation. Because the constitutionality of Title III of the CCPA had not been decided previously, *Hodgson-Cleveland* is the first opinion on this issue. The court agreed with the declared congressional purpose[46] and subsequently found Title III ". . . a constitutional and valid exercise of congressional power."[47] After deciding this initial matter the court then addressed itself to the question of whether the Ohio Act should stand or fall in whole or in part, to the mandates of the CCPA. Section 1673(c) of the CCPA provides: "No court of the United States or any State may make, execute, or enforce any order or process in violation

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42 15 U.S.C. § 1674(b) (1970).

43 15 U.S.C. § 1672 (1970).

For the purposes of this subchapter:

(a) The term "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

(b) The term "disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

(c) The term "garnishment" means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt.

44 OHIO REV. CODE ANN. §§ 2329.62, 2329.66 (Page Supp. 1970). Section 2329.62 reads in part: "Every person resident of the state, not included in section 2329.66. . . ."

45 326 F. Supp. 419 (1971).

46 15 U.S.C. § 1671 (1970).

47 326 F. Supp. at 429.

of this section."[48] This question required a judicial construction of portions of both the CCPA and the Ohio Act.

Those portions of the CCPA which required an interpretation were §§ 1673, 1675, and 1677, which involved the question of whether Congress chose the *work week* as the unit for computing exemptions from garnishment and whether any state statute not using the week as the computation unit was in violation of the CCPA. The court concluded that Congress selected the week as the *mandatory* unit. Influential in the court's reasoning process in arriving at this conclusion was the congressional conference report quoted in the court's opinion[49] stating:

> *No garnishment is allowed* which would exceed either 25 percent of disposable earnings, or the amount by which the weekly disposable earnings exceed 30 times the Federal minimum hourly wage, whichever is less.[50]

Because of this Congressional statement, the court concluded,

> [t]his reference further reveals congressional intention to make mandatory the legislated restrictions on garnishment. It is written into law. Section 1673(a) uses the phrase "may not exceed." Title V—General Provisions of the Consumer Credit Protection Act, Section 503 . . . recites "grammatical usages." In part, it states:
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> (3) The phrase "may not" is used to indicate that an action is both unauthorized and forbidden.
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> In its last sentence, section 1673(a) orders the Secretary to prescribe by regulation:
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> In the case of earnings for any pay period other than a week, *** a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2).[51]

To arrive at its conclusion that Congress chose the week as the mandatory computation unit, the court performed a judicial interpretation of the CCPA which it does not explicitly state. This can be seen by considering §§ 1675 and the applicable part of 1677 set out consecutively here.

> The Secretary of Labor may by regulation exempt from the provisions of section 1673(a) of this title garnishments issued under the laws of any State if he determines that the laws of that State provide restrictions on garnishment which are *substantially similar* to those provided in section 1673(a) of this title.[52]
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> . . . .

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[48] 15 U.S.C. § 1673(c) (1970).

[49] 326 F. Supp. at 430.

[50] CONF. REP. NO. 1397, 90th Cong., 2d Sess. 2029 (1968) (emphasis added).

[51] 326 F. Supp. at 430. It should be noted that the court also gave judicial sanction to the regulations promulgated by the Secretary of Labor pursuant to Section 1673(a), *see* note 39 *supra*. "The provisions of these regulations applicable to pay periods longer than one week are declared and determined to conform to the language and intent of section 1673(a) and its specified standards." 326 F. Supp. at 430.

[52] 15 U.S.C. § 1675 (1970) (emphasis supplied).

> This subchapter does not annul, alter, or affect, or exempt any person from complying with, the laws of any State
>
> (1) prohibiting garnishments or providing for *more limited* garnishment than are allowed under this subchapter. . . .[53]

Section 1673(a) states in part that "[*e*]*xcept as provided* in subsection (b) of this section and *in section 1675 of this title*, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment *may not exceed* (1) 25 per centum of his disposable earnings for that week. . . ."[54]

The *Hodgson-Cleveland* court focused on the "may not exceed" language of § 1673(a) and not on the "except as provided in § 1675" language. Consequently, the court implicitly assumed that for a state's garnishment laws to be "substantially similar" to (the language of § 1675) or "more limited" than (the language of § 1677) the CCPA, that state's laws must at least provide that no more than 25 percent of any workweek's earnings can be garnished.[55] With this implicit interpretation a silent factor in its reasoning process, the court concluded:

> . . . It is determined and declared that interlocked section 1673(a) and section 1673(c) federally forbid the making, execution, or enforcement of any State court "order or process" that violates the restrictions on garnishment contained in section 1673(c) or any regulation of the Secretary . . . . Likewise, the effect of any State garnishment law that underlies such offending State court "order or process" is federally preempted.
>
> . . . .
>
> Once having forbidden the validity of any State court "order or process" that violates section 1673(a) it is unlikely that Congress in a later provision of the same law would recant that prohibition. In any event, the general language of section 1677 . . . shows no Congressional intention to abrogate or weaken the specific Federal preemption ordered by Congress in section 1673(c).[56]

According to the *Hodgson-Cleveland* court those sections of the Ohio law which required judicial interpretation to determine an employee's allowable disposable earnings subject to garnishment were §§ 1911.332, 2329.62 and 2329.66. To make this determination it is necessary to read the applicable portions of these three sections together. Sections 2329.62(C) and 2329.66(B) are similar[57] and provide for the exemp-

[53] 15 U.S.C. § 1677 (1970) (emphasis supplied).

[54] Emphasis supplied.

[55] This same result was reached by Robert D. Moran, Administrator of the Wage and Hour Division, delegate of the Secretary of Labor, in denying Ohio's application for exemption on November 24, 1970. In his deial he concluded ". . . the clear statement of Congress is [§ 1673] addresses itself to restrictions on garnishment in terms of disposable earnings for any workweek or other pay period. . . ."

[56] 326 F. Supp. at 431-32.

[57] OHIO REV. CODE ANN. §§ 2329.62(C) and 2329.66 (G) (Page Supp. 1970) are identical with the exception that the former contains just the word "earnings" while the later contains the words "personal earnings."

tion of the greater of either (1) 82½ percent of the employee's disposable earnings for services rendered within 30 days or (2) one hundred seventy-five times the minimum hourly wage. Therefore, it is these two sections which, in the converse, determine the amount of a debtor's earnings which are subject to garnishment (17½ percent) under § 1911.332. The court concluded that the implementing provision of § 1911.332 when properly construed,

> . . . requires an employer to withhold for the payment of an employee's judgment debt and to pay into court a portion of an employee's disposable earnings for that week that represent 17½ percent of the employee's total earnings for the previous 30 days.[58]

After construing both the state and federal laws the court met the preemption issue of whether § 1911.332 ". . . require[s] an Ohio court to violate 15 U.S.C. § 1673 (a) (1970) and its maximum of 25 percent of an employee's disposable earnings for that week?"[59] The court answered this inquiry by concluding ". . . that the express preemption of sections 1673(a) and (c) directly applies to garnishments of the disposable earnings of Ohio employees paid on a weekly, bi-weekly, or semi-monthly basis."[60] Continuing, the court specifically held that:

> Upon the entire record and in accordance with the determinations and declarations heretofore made, it is specifically determined and declared that Ohio Rev. Code § 1911.332 (1970) as to lines 4, 5, and 6 of Section

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[58] 326 F. Supp. at 434. In its earlier interlocutory memorandum and order, at page 9, James D. Hodgson, Secretary of Labor v. Cleveland Municipal Court, Civil Action No. C. 70-908 (N.D. Ohio September 25, 1970), the court arrived at a different construction of the Ohio law.

> . . . [T]hose disposable earnings that shall be subject to garnishment shall refer to *actual earnings due and owing* an employee at the time of garnishment (emphasis supplied).

The court initially construed the Ohio law in this manner to avoid an equal protection problem presented by the parenthetical language found in line (4) of section B of the form found in § 1911.332, which suggests that an employee who has not worked a full 30 days may be garnished as though he had. However, while eliminating this equal protection problem by referring to actual earnings (the use of the words disposable earnings accomplishes the same idea), this September 25, 1970 construction, by referring to earnings due and owing, created a conflict between the exemption standards of §§ 2329.62(C) and 2329.66(G) (exempting 82½ percent of an employee's earnings from garnishment) and § 1911.332 which was structured (in a converse manner) to implement those exemption standards.

This conflict may be illustrated by the following example. An employee who has earned $430.00 during the prior 30 days and is paid $100.00 weekly, would have 17½ percent of his $100.00 pay check garnished. This would mean that over 95 percent of his prior 30 day earnings (only one garnishment is permitted every 30 days) would be exempt from garnishment — a greater exemption than allowed by §§ 2329.62(C) and 2329.66(G).

To preserve the exemption standards of §§ 2329.62(C) and 2329.66(G), while still avoiding the equal protection problem, the court overturned its September 25, 1970 construction of the Ohio Act to the extent that it replaced the language "due and owing an employee at the time of garnishment" with the language "the employee's total earnings for the previous 30 days," while maintaining the notion that only actual earnings (through the continued use of the words "disposable earnings") could be garnished.

[59] 326 F. Supp. at 434.

[60] *Id.* at 435.

B, "Answer of Employer (Garnishee)," Ohio Rev. Code § 2715.112 (1970), insofar as it incorporates Ohio Rev. Code § 1911.332 (1970) and lines 2, 3, and 4 of "Payment to Avoid Garnishment" of Ohio Rev. Code § 2715.02 (1970), are expressly preempted by 15 U.S.C. §§ 1673 (a) and (c) (1970).[61]

To illustrate why §§ 1673(a) and (c) of the CCPA preempted § 1911.332 of the Ohio law, the differing effects of the state and federal formulas are demonstrated. Under the Ohio provisions as written, a worker paid $430.00 once a month[62] would have $75.25 withheld from his earnings by garnishment, while under the CCPA this same worker would have $107.50 withheld. The effects of the Ohio procedure are obvious when considering a monthly paid worker. However, consider the worker paid once a week. Under Ohio's formula, which allows only one garnishment every 30 days, a worker paid $100.00 once a week would have $72.25 withheld, while under the CCPA this same worker would have only $25.00 withheld.[63] The differing effects upon the weekly paid worker frame the main point of conflict between the federal and Ohio law.

By preempting only those Ohio sections relating to weekly and semi-monthly paid employees, the Ohio provision concerning monthly paid debtors would have been left intact. To provide uniformity in application for all pay periods the court imposed the same federal 25 percent garnishment standard to monthly paid employees.[64] As a result, the implementing provisions of § 1911.332[65] for garnishing an employee's

[61] *Id.* at 437.

[62] Assume, as did the Secretary of Labor, *see* note 39 *supra*, that a calendar month consists of 4 1/3 workweeks. Also assume in this example and all following ones that all necessary deductions required by law have been made, and that what the worker is paid represents what is left after the deductions have been made.

[63] A complete example of how the various formulas operate is illustrated by the use of a table presented here.

	CCPA		Ohio's Act	
	Lesser of		Lesser of	
Pay Periods and Amounts Earned	(§ 1673) 25%	30 or times $ 1.60	(§ 1911.332) 17½%	175 or times $ 1.60
Monthly $430	$107.50	$208.00	$75.25	$280.00
Semi-monthly $215	$ 53.75	$ 96.00	$75.25	$280.00
Weekly $100	$ 25.00	$ 48.00	$75.25	$280.00

[64] 326 F. Supp. at 436.

[65] OHIO REV. CODE ANN. § 1911.332 (Page Supp. 1970). Lines 3, 4, 5 and 6 of Section B, *see* note 29 *supra*.

wages were replaced by court promulgated provisions.[66] These replacement provisions, inserted into the mechanical process for garnishing earnings in Ohio, left the state with a functionable garnishment law. Included in this judicially reconstructed law was the original Ohio Act's feature permitting only one garnishment every 30 days.[67]

V. CONCLUSION

The court's rehabilitation of the Ohio Act, although extensive, was not complete. Several questions remain unanswered.

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[66] 326 F. Supp. at 438-39.

3. Enter on line 3 all disposable earnings defined in Section 302(b), CCPA (15 U.S.C., § 1672(b) (1968) and Ohio Revised Code § 2329.621 (1970) payable, or accrued, to the defendant (employee) for any pay period at the time of your receipt of this Order and Notice of Garnishment. If disposable earnings are payable, or accrued, for more than one pay period, make a separate entry for each pay period showing the amount of disposable earnings and the time periods that these amounts represent.

$_____	_____
Present pay period	Time period involved
$_____	_____
Previous pay period	Time period involved

4. Enter on line below the smaller: 25% of whatever amount or amounts have been entered on line 3, or the difference between each amount on line 3 the following computations:

$48 if the time involved is 1 week or less.
$68.38 if the time involved is greater than 1 week of a 10-day pay period.
$96 if the time involved is greater than 1 week of a bi-weekly pay period.
$104 if the time involved is greater than 2 weeks of a semi-monthly pay period.
$208 if the time involved is greater than ½ month of a monthly pay period.

$_____	$_____
Present pay period	Previous pay period

5. Extend to line 5 the total of the entries made on line 4. Pay said total amount into court when returning this form. However, in no event shall the amount paid into Court exceed the amount on line C of Section A of this form.

$_____

I certify that the statements above are true.

_____	_____
Print name of employer	Print name and title of person who completed form

Dated this _____ day of _____, 19____.

_____
Signature of person completing form

[67] 326 F. Supp. at 436. It was argued by the defendants that because the court declared that garnishment was to be computed based on the unit of a work week and not the unit of a 30-day period, the court should also declare that the number of permissible garnishments should be based on the unit of a work week. The court rejected this argument because it ". . . misconceives the extent of this court's power of preemption." 326 F. Supp. at 436.

The court defined its power of preemption based on Colorado Anti-Discrimination Comm. v. Continental Air Lines, Inc., 372 U.S. 714, 722 (1963):

> To hold that a state statute identical in purpose with a federal statute is invalid under the Supremacy Clause, we must be able to conclude that the purpose of the federal statute would to some extent be frustrated by the state statute.

In rejecting the defendant's argument, the court declared, "It is plain that enforcement of

Among these questions is the potential for an equal protection[68] problem. Because the Ohio law as interpreted in *Hodgson-Cleveland* still permits only one garnishment every 30 days, employees who receive the same monthly earnings but have differing pay periods will have different amounts garnished from their monthly earnings. For example, the employee who is paid $100.00 once a week ($430.00 per month)[69] under the court-imposed formula will have $25.00 dollars garnished from his monthly earnings, while the employee who is paid $430.00 once a month will have $97.50 garnished from his monthly earnings.[70] Obviously this presents an inequitable situation which discriminates against the debtor who is paid once a month. It is difficult to discern any rational basis for this result. When the Ohio legislature enacted Amended Substitute Senate Bill No. 85, it had a rational basis for its particular legislative scheme—a 30-day pay period. When Congress enacted the CCPA it also had a rational basis for its particular legislative scheme—the work week. However, in attempting to integrate the two legislative schemes the *Hodgson-Cleveland* court arrived at an apparent irrational result. To remedy this inequity the court could have reconstructed the Ohio law to permit one garnishment every pay period. However, to do this the court would have been forced to ignore its conception of the doctrine of preemption.[71]

A second area which demands scrutiny is the court's holding that ". . . it is specifically determined and declared that . . . lines 2, 3, and 4 of 'Payment to Avoid Garnishment' of Ohio Rev. Code § 2715.02 (1970), are expressly preempted by 15 U.S.C. § 1673(a) and (c) (1970)."[72] Why was the court so concerned with § 2715.027? That portion of the Ohio law which determined how much, in fact, would be garnished from an employee's earnings was § 1911.332 not § 2715.02.[73] Section

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the Federal garnishment law, silent on the subject of frequency of garnishments, is not 'frustrated' by the Ohio limitation of one garnishment a month." 326 F. Supp. at 436.

[68] U.S. CONST. amend. XIV, § 1.

[69] *Supra* note 62.

[70] This same effect occurs in the instances of those employees whose pay periods are longer than a week but shorter than a month.

[71] An interesting question, ancillary to the scope of this note, is: Why did this federal court, after striking lines 3, 4, 5, and 6 of Section B of the form contained in OHIO REV. CODE ANN. § 1911.332, then promulgate its own forms? The supremacy of the federal law is not doubted, but does not the federal court's task halt with striking down the conflicting state law when there is no federal law to replace it? The CCPA sets only standards for garnishment, it does not devise procedures to implement those standards. Since OHIO REV. CODE ANN. §§ 2329.62(C) and 2329.66(G) represent the exemption standards which OHIO REV. CODE ANN. § 1911.332 implements in the converse, it must be implicitly assumed (because the court was silent), these sections no longer stand as originally written. If this is so, the court, while employing its own version of judicial architecture, should have finished its work by either replacing the old exemption standards with its own, or by stating that the converse of what it prescribed for § 1911.332 is the new §§ 2329.62(C) and 2329.66(G).

[72] 326 F. Supp. at 437.

[73] *See* note 21 *supra.*

2715.02 provides for a *voluntary* procedure to avoid all effects of the involuntary procedure of § 1911.332.

A further question resulting from the *Hogdson-Cleveland* decision concerns the last paragraph of § 2715.01[74] and § 1674(a)[75] of the CCPA. The court quotes these two sections and determines that the record before it ". . . discloses no justiciable controversy. . . ."[76] However, the effect of the language of the two sections is not similar and does present a conflict. The CCPA provides that an employee may not be discharged because his earnings ". . . have been subjected to garnishment for *any one indebtedness*[,]"[77] while the Ohio Act provides that an employee may not be discharged because his earnings have been subjected to ". . . *no more than one action in garnishment* in any twelve-month period."[78] The first dissimilarity is that § 1674(a) provides for no time restriction while the Ohio law does. The significant difference, however, is that under the Ohio provision an employee may be discharged upon the second action in garnishment on *one indebtedness* in any 12-month period. Comparatively, under § 1674(a) an employee may *not* be discharged upon the second action in garnishment on one indebtedness. This conflict could easily be reconciled by judicial interpretation under the authority of the legislative intent clause found in the Ohio Act.[79]

One minor question left by the court in its opinion remains unresolved. This question relates to the language in the first sentence of § 2329.62, which states, "[e]very person resident of the state. . . ." Arguably this language could exclude from the restrictions upon the amount of earnings which may be garnished, a non-resident of the state who was employed and paid in the state. Again this minor matter could easily be corrected by judicial construction pursuant to the legislative intent clause found in the Ohio Act.[80]

As a result of *Hodgson-Cleveland*, Ohio's legislative attempt to escape the super-imposition of federal law failed in large measure.[81] Ohio

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[74] *See* note 41 *supra.*

[75] *See* note 40 *supra.*

[76] 326 F. Supp. at 437.

[77] 15 U.S.C. § 1674(a) (1970) (emphasis supplied).

[78] OHIO REV. CODE ANN. § 2715.01(L) (Page Supp. 1970) (emphasis supplied).

[79] OHIO REV. CODE ANN. § 3239.621 (Page Supp. 1970).

[80] *Id.*

[81] Hodgson v. Cleveland Municipal Court, 326 F. Supp. 419 (N.D. Ohio 1971), is being followed by state courts in Ohio's northern district, but by few state courts in the southern district. To bring the entire state in line with federal standards, the Secretary of Labor has brought suit in the southern district seeking a permanent injunction against the Hamilton County Municipal Court to halt its use of a garnishment process similar to that in the original Ohio Act. The Secretary has been successful in securing a preliminary injunction, James D. Hodgson, Secretary of Labor v. Hamilton County Municipal Court, Civil Action No. 7954 (S.D. Ohio September 23, 1971), and it is assumed he will be successful in securing a permanent injunction.

is now left with a hybrid garnishment process generally more restrictive than the original Ohio Act. Whether the General Assembly will accept this hybrid garnishment process or again attempt to revise the Ohio law remains to be seen.

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